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No. 84-783 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

PAUL C. MURRAY, PETITIONER

v.

THEODORE M. GARDNER, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

BARBARA L. HERWIG
FRANK A. ROSENFELD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

23pp

QUESTIONS PRESENTED

1. Whether petitioner's remarks at a meeting with his supervisors, expressing opposition to his temporary furlough and charging that a supervisor attempted to coerce him to remain silent, constituted speech on a matter of public concern such that a 14-day suspension allegedly imposed in retaliation for the remarks violated the First Amendment.

2. Whether the FBI, in imposing the suspension, denied petitioner procedural protections to which he was entitled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 741 F.2d 434. The orders (Pet. App. A15-A16) and opinion (App., *infra,* 1a-8a) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1984. The petition for a writ of certiorari was filed on November 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a special agent of the Federal Bureau of Investigation who formerly served in the Washington Field Office (WFO). Because of anticipated delays in securing funding, the WFO developed a plan in November 1981

under which about a third of the special agents in the office would be temporarily furloughed. The WFO management chose the agents to be furloughed by drawing names at random, and petitioner's name was chosen. Pet. App. A2. Petitioner voiced an objection to this plan to respondent Laken, the principal Legal Adviser of the office, and to respondent Gardner, the Special Agent in charge. Petitioner claims that Laken made several statements to him that "were intended to give an impression that opposition to the furlough plan could be detrimental to a person's career status" (*id.* at A3, A41). At a subsequent conference of all WFO employees to discuss the furloughs, petitioner stated that the lottery method for determining whom to furlough was arbitrary and capricious and that he preferred considering veteran's status and length of service. Petitioner also accused respondent Laken of trying to coerce him into silence. *Id.* at A4, A41. Respondent Gardner, deeming the coercion charge to be a serious accusation, ordered petitioner to submit a memorandum detailing the charge (*id.* at A4).

Petitioner submitted a rough draft of his charges, but his supervisors told him that the draft was "unacceptable, unprofessional and bordering on insubordination" (Pet. App. A4, A42). In response, petitioner prepared a more detailed written letter describing his allegations. To prepare this, he borrowed the rough draft but did not return it to his supervisors when he submitted the more detailed letter (*id.* at A5). Soon thereafter, petitioner's supervisors referred him to the FBI's Office of Professional Responsibility for possible discipline (*ibid.*).

On January 20, 1982, respondent Revell, an Assistant Director of the FBI, informed petitioner by letter that the FBI was considering whether to suspend him for 30 days without pay because of his failure to cooperate with the investigation of his coercion charges (Pet. App. A5, A44).

The letter stated as grounds for the proposed suspension that petitioner failed to follow instructions on the preparation of his memorandum detailing the coercion charges, that he tried to interfere with the investigation of the charges, that he lacked candor, and that he was insubordinate for not returning the rough draft (*id.* at A44). Petitioner filed a written response to this letter on January 28, 1982 (*id.* at A6). On March 11, 1982, respondent Revell informed petitioner by letter that he would be suspended without pay for 14 (rather than 30) days and that he would be on probation for six months (*ibid.*).

2. Petitioner then filed this suit in the United States District Court for the District of Columbia against respondents, six of his supervisors, seeking damages from them in their personal capacities as well as injunctive relief. Petitioner alleged a violation of his First Amendment rights, a deprivation of due process, defamation, intentional infliction of emotional distress, and conspiracy. Pet. App. A48-A50.

The district court dismissed the complaint (Pet. App. A15, A16). The court concluded that petitioner was given all the process to which he was entitled and that the defendants were immune from suit on the common law tort claims (App., *infra,* 6a). The court further ruled that because petitioner's statements did not not deal with a matter of "public concern," this Court's decision in *Connick* v. *Myers,* 461 U.S. 138 (1983), required the dismissal of petitioner's First Amendment claim alleging that he was suspended in retaliation for his speech (Pet. App. A15).[1]

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[1]The district court initially declined to dismiss the First Amendment claim, concluding that factual issues were in dispute (App., *infra,* 3a-6a), but it reconsidered its holding after this Court's decision in *Connick*.

The court of appeals affirmed (Pet. App. A1-A14), agreeing with the district court that petitioner's First Amendment claim was barred under *Connick*. The court of appeals noted that *Connick* established that expression by a public employee is not protected if it " 'cannot be fairly considered as relating to any matter of political, social, or other concern to the community' " (*id.* at A8, quoting 461 U.S. at 146). The court stated that it could "[d]iscern nothing in [petitioner's] remarks that would enrich the public's store of appropriate knowledge on the operation of the FBI or which would in any way relate to matters of general public concern. Rather, his remarks appear to be an example of the quintessential employee beef: management has acted incompetently" (Pet. App. A9). The court of appeals also agreed with the district court that petitioner received all the procedural protections to which he was entitled (*id.* at A12-A14).

ARGUMENT

1. a. Petitioner's principal contention (Pet. 6-12) is that his suspension, allegedly imposed in retaliation for the statements he made at the meeting to discuss the furlough policy, violated the First Amendment. As the courts below ruled, this claim is squarely foreclosed by *Connick*.

In *Connick*, a public employer initiated a transfer of Myers, an Assistant District Attorney, to different job duties. Myers voiced her objection to the transfer to her superiors, then circulated a questionnaire to other Assistant District Attorneys, soliciting their views on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." 461 U.S. at 141. Myers was dismissed for circulating the questionnaire. This Court ruled that, with the exception of the question about pressure to work in a political campaign,

Myers's speech did not address any "matter of public concern" (*id.* at 149) but rather was "most accurately characterized as an employee grievance concerning internal office policy" (*id.* at 154).[2] The Court, noting that common sense dictates "that government offices [can]not function if every employment decision bec[o]me[s] a constitutional matter" (*id.* at 143; footnote omitted), stated that "if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge" (*id.* at 146; footnote omitted). The Court accordingly held as follows (*id.* at 146-147):

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. * * *
>
> * * * We hold * * * that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances,

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[2]The Court analyzed separately the single question, concerning pressure to participate in political campaigns, that did address a matter of public concern. It rejected that claim as well, after striking the balance required by *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). 461 U.S. at 149-154. Petitioner's statements contain no parallel to this question.

> a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

This case is on all fours with *Connick*. Petitioner, like Myers, was a professional employee in a law enforcement office. Both felt they were treated unfairly by a management decision on allocation of personnel, one by a transfer to new duties, the other by a temporary furlough. Both expressed objections, first directly to their superiors and then more generally to other office employees. As part of their objections, both suggested that certain of their superiors were not fair or trustworthy. In all other respects, petitioner's statements, like Myers's, consisted solely of criticism of the particular personnel decision that adversely affected him. *Connick* therefore compels the conclusion that petitioner was not commenting on any matters of public concern and that the disciplinary actions taken against him did not violate the First Amendment.

Petitioner attempts to avoid *Connick* by asserting that his speech did in fact involve matters of public concern: "the appropriate use of limited public funds" (Pet. 7); "the quality of personnel to be maintained on the FBI staff" (Pet. 8); and "intimidation of Federal employees" (Pet. 9). But similar arguments could have been advanced by Myers (see 461 U.S. at 163-165 (Brennan, J., dissenting)) and could be advanced by every public employee who is disciplined for making statements that, by challenging the decision of a superior official, disrupt morale or the orderly functioning of a government office. See 461 U.S. at 148; *id.* at 149 ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case."). As the court of appeals explained (Pet. App. A10),

"[i]f *Connick*'s rule could be bypassed by the arguments that [petitioner] raises — that public monies and government efficiency are involved — *Connick* would stand for nothing."[3]

Finally, petitioner contends (Pet. 11-12) that his First Amendment claim is not barred under *Connick* because he was disciplined for remarks made at a forum created by management for the purpose of airing views about the furlough plan. We note that in *Connick*, as well, there was a suggestion that the employer had invited the speech for which Myers was subsequently disciplined. See 461 U.S. at 141 (questionnaire was prepared in response to supervisor's suggestion that Myers's "concerns were not shared by others in the office"). In any event, petitioner's argument — that he should not be disciplined because "[i]mplicit in the invitation to speak is the assurance that a price or penalty will not be extracted on account of what is said" (Pet. 11) — is not a claim that his speech involved a matter of public concern or for some other reason is entitled to greater protection under the First Amendment than Myers's speech was afforded. Rather, petitioner's argument is that it was unfair for the FBI to discipline him for speech that the FBI itself had invited. But the Court clearly ruled in *Connick* that when a public employee's speech does not involve a matter of public concern, the Court will not entertain a First Amendment claim that discipline imposed in response to that speech was unfair or unreasonable. 461 U.S. at 146, quoted at page 5, *supra*.

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[3]Notably, petitioner, like Myers, alleges only that he was disciplined for speech in the workplace. It is therefore immaterial — even assuming that it is true — that the "subject matter [of petitioner's remarks] could, in different circumstances, have been the topic of a communication to the public that might be of general interest." *Connick*, 461 U.S. at 148 n.8.

b. Petitioner's claims for damages — which were brought against respondents in their personal capacities — are precluded for other reasons as well. Even if the Court were to disagree with our submission that this case is controlled by *Connick,* there can surely be no dispute that at the very least, a substantial argument can be made under *Connick* that petitioner's suspension did not violate the Constitution. Accordingly, petitioner unquestionably has not stated a violation of "clearly established * * * constitutional rights of which a reasonable person would have known" (*Harlow* v. *Fitzgerald,* 457 U.S. 800, 818 (1982)).[4] Respondents are therefore immune from damages liability. *Ibid.*

Moreover, Congress has provided a specific remedy for employees of the FBI who claim that they have been disciplined for "whistleblowing" — that is, for disclosing information that is reasonably believed to reveal a violation of law, "mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. 2303. Congress deliberately excluded employees of the FBI from the coverage of other remedies designed to protect alleged whistleblowers. See 5 U.S.C. 2302(a)(2)(C)(ii). Although petitioner asserts that his speech involved a matter of public concern because it addressed mismanagement of personnel and the misuse of funds, he does not suggest that he is eligible to invoke, or has sought to invoke, the remedy Congress provided. In view of the careful congressional design, the marginal — at best — nature of petitioner's constitutional claim, and the fact that petitioner's claim raises an issue that "may appropriately be characterized as one of 'federal personnel policy' " (*Bush* v. *Lucas,* 462 U.S. 367, 381 (1982)), it would be

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[4] *Connick* was not a departure from previous decisions of this Court. Indeed, the Court in *Connick* relied heavily on its prior precedents. See, *e.g.,* 461 U.S. at 142, 143, 146.

"inappropriate * * * to supplement" the remedy Congress has provided with an implied damages remedy against individual officials (*id.* at 369).

2. Petitioner also claims (Pet. 13-16) that the FBI denied him certain procedural protections to which he was entitled. Petitioner contended in the courts below that he was deprived of liberty and property without due process of law, in violation of the Fifth Amendment. The courts below correctly rejected this contention for the following reasons (Pet. App. A13, quoting App., *infra*, 6a):

> [E]ven if [petitioner] does have * * * property and liberty interests [in continued employment with the FBI], he was given all the process that was due under the circumstances. Due process requirements vary according to the severity of the threatened loss. See, *e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). In [petitioner's] case, the major disciplinary action taken against him was a fourteen-day suspension without pay. Prior to that suspension he was notified of the proposed disciplinary action and given the opportunity to respond orally and in writing to accusations on which the action was based. Such notice and opportunity to be heard [were] sufficient to satisfy due process requirements under the circumstances. [5]

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[5]In addition, Congress has devised a carefully graduated scheme that requires a certain degree of process when a suspension of 14 days or less is imposed on a federal employee (see 5 U.S.C. 7502); additional procedural protections when a more severe sanction is imposed (see 5 U.S.C. 7511 *et seq.*); and further protections when an employee alleges that he has been disciplined for certain impermissible reasons (see 5 U.S.C. 2301 *et seq.*). Petitioner received the procedural protections that Congress specified, and the congressional balancing of the relevant interests (see *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976)) should be accorded great deference in determining the constitutional requirements of due process.

Petitioner now appears to contend not that the Due Process Clause of its own force required that he be afforded additional procedural protections but only that the FBI failed to comply with 5 U.S.C. 7503 and with its own letter warning petitioner that his suspension was under consideration. To be sure, petitioner asserts that the Due Process Clause requires an agency to comply with its own "regulations and orders" even when those regulations provide greater protection than the Due Process Clause itself (Pet. 13). But that assertion is incorrect; the general principle that an agency must follow its own regulations — a requirement that is by no means absolute in any event (see *United States* v. *Caceres*, 440 U.S. 741, 754 n.18 (1979)) — is at most a " 'judicially evolved rule of administrative law' " (*ibid.*, quoting *Vitarelli* v. *Seaton*, 359 U.S. 535, 547 (1959) (opinion of Frankfurter, J.)), not a constitutional requirement. Since petitioner does not assert that the Constitution was violated, he has again failed to state a claim for damages; he suggests no reason to believe that the violation of a statute — much less a failure to provide certain procedures outlined in a letter — can give rise to a damages action against federal officials in their personal capacities.

In any event, petitioner was not denied any procedural protections to which he was entitled by statute or otherwise. Petitioner correctly notes (Pet. 14, 16) that 5 U.S.C. 7503(b)(3) provides the right to "be represented by an attorney or other representative" in connection with a proposed suspension of 14 days or less. Although petitioner now asserts that this right was denied "on three occasions" (Pet. 14), the complaint identifies only one occasion, a meeting between petitioner and respondent Vatter (Pet. App. A45-A46). But the purpose of that meeting, according to petitioner's own account, was not to consider petitioner's suspension — something respondent Vatter did not have the responsibility to do — but to discuss modifying

petitioner's performance appraisal. Section 7503 does not grant an employee the right to an attorney at a meeting to discuss a performance appraisal, and nothing in Section 7503 suggests that an employee has the right to an attorney at every meeting with a superior concerning his job status whenever a suspension is under consideration by certain other superiors.

The letter of January 20, 1982, on which petitioner relies (Pet. 14), informed him that the FBI was considering suspending him for 30 days, and detailed the procedural rights he would be afforded. Petitioner asserts that he did not in fact receive some of these protections — specifically, certain internal agency review proceedings and a right to appeal to the Merit Systems Protection Board (MSPB). But the rights detailed in the letter are those that would have been granted if petitioner had been suspended for 30 days, as the letter proposed. The less severe sanction ultimately imposed on petitioner does not warrant the same protections. Compare 5 U.S.C. 7503 with 5 U.S.C. 7513(d) (an employee can appeal to the MSPB only a disciplinary sanction more severe than a 14-day suspension).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

BARBARA L. HERWIG
FRANK A. ROSENFELD
Attorneys

FEBRUARY 1985

DOJ-1985-02

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL C. MURRAY,	)
	)
Plaintiff,	)
	)
v.	) Civil Action No. 82-2405
	) FILED
THEODORE M. GARDNER, et al.,	)
	) MAR 21 1983
Defendants,	)
	) James F. Davey, Clerk
	)

MEMORANDUM

Paul C. Murray, an Agent in the Federal Bureau of Investigation (FBI), brings this action for damages and injunctive relief against six fellow Agents of the FBI. Murray alleges that the defendants improperly disciplined him for his comments concerning an FBI furlough plan, in violation of the First and Fifth Amendments of the United States Constitution. Murray also makes several tort claims. The action is now before the Court on defendants' motion to dismiss or, in the alternative, for summary judgment.

In November of 1981, the FBI was forced to develop a plan to furlough approximately one-third of the Agents in the Washington Field Office (WFO) due to funding delays. The WFO management decided to choose the Agents to be furloughed by drawing names from a hat containing the names of essentially all the Agents in the office. The drawing was held and Murray was notified on November 23, 1981, that his name had been drawn.

At the time of the drawing, Murray was embroiled in a battle with his ex-wife over custody of their children. Murray indicated to one of the defendants, Agent Laken, WFO Principal Legal Advisor, that his custody case would be harmed if he was furloughed and that he would oppose the furlough lottery plan. Laken allegedly told Murray that his career could be jeopardized if he spoke out against the plan.

On November 25, 1981, the WFO management held an "all employees" conference to discuss the furlough plan. Murray spoke vehemently against the plan at the conference, calling it arbitrary and capricious, and objected openly to Laken's alleged attempt to coerce him into silence. Defendant Gardner, Special Agent in Charge (SAC) of the WFO, ordered Murray to report to Defendant Schreiber, Assistant Special Agent in Charge (ASAC), following the meeting.

Gardner and Schreiber discussed his allegations with Murray and ordered him to file a written report concerning those allegations. Murray did take steps to file such a written report. In the process, however, he apparently angered ASAC Schreiber, allegedly because he did not submit the report in proper form and refused to return a "rough draft" to Schreiber. As a result, he was accused of insubordination and became himself the target of an investigation.

On December 11, 1981, Murray was interviewed by Defendant Ford, an FBI Agent assigned to the Office of Professional Responsibility. Ford asked Murray to discuss the events surrounding the "all employees" conference. Ford allegedly did not inform him that he was the Agent being investigated. Murray was notified by a letter dated January 20, 1982, from Defendant Revell, Assistant Director of the FBI, that the FBI was considering suspending him for thirty days and placing him on probation. The reasons given for the punishment were related to Murray's alleged

failure to properly present a written memorandum concerning his allegations concerning the furlough plan and for insubordination for failing to return a "rough draft" when ordered to do so by ASAC Schreiber. Revell's letter also outlined certain procedural rights accorded Murray. Murray responded to the allegations raised by Revell in a letter to Revell dated January 28, 1982.

On February 22, 1982, Murray met with Defendant Vatter, ASAC. Murray and Vatter discussed the matters relating to Murray's claims concerning the furlough plan and Vatter indicated that Murray's annual performance rating was being retroactively reduced in one area from "superior" to "minimally acceptable", and reduced overall. This was the first instance in Murray's approximately eleven-year FBI career that he had received a rating lower than "superior."

Murray received another letter from Defendant Revell on approximately March 11, 1982. This letter informed Murray that he was suspended without pay for fourteen days and placed on probation for six months. Murray served the suspension and in late March of 1983, he was transferred. The Complaint which began this action was filed on August 25, 1982.

Murray alleges five separate causes of action as grounds for relief: (1) violation of his First Amendment rights, (2) violation of his Fifth Amendment rights, (3) defamation, (4) intentional infliction of emotional distress, and (5) conspiracy. The first two of these claims are based on the United States Constitution and the remaining three are common law tort claims.

The First Amendment claim raised by Murray is based on his contention that the disciplinary actions taken by defendants were in retaliation for his statements at the "all employees" meeting. Government employees are partially

protected by the First Amendment from being fired or otherwise disciplined because of their statements. The scope of the First Amendment protection is limited by the government's legitimate interest in insuring efficiency in government operations. *See, e.g., Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977); *Pickering v. Board of Education,* 391 U.S. 563 (1968).

The validity of Murray's First Amendment claim can be determined by applying the three-step analysis established by the Supreme Court. *See id.* Initially, the Court must determine whether Murray's statements were "protected speech" under the First Amendment. *Pickering v. Board of Education,* 391 U.S. at 568-570. Murray's statements at the "all employees" conference will be protected if the balance between his interest in making such statements and the government's interest in promoting harmony and efficiency weighs in his favor. *Id.* Since Murray's comments were not directed to a matter of true public concern, his free speech interest is somewhat discounted. *See Foster v. Ripley,* 645 F.2d 1142 (D.C. Cir. 1981). The FBI, however, has failed to show beyond reasonable dispute that some actual harm resulted from Murray's statements concerning the FBI's furlough plan and Agent Laken's actions. Such a showing is required in this Circuit to overcome an employee's interest in speaking freely. *See Tygrett v. Berry,* 627 F.2d 1279, 1282 (D.C. Cir. 1980); *Waters v. Chaffin,* 684 F.2d 833, 839 n.12 (11th Cir. 1982). Under the *Pickering* test, therefore, the Court must conclude in considering this motion that Murray's statements at the "all employees" conference are entitled to First Amendment protection. *See Hanson v. Hoffman,* 628 F.2d 42 (D.C. Cir. 1980).

To recover for violation of First Amendment rights, Murray must also show that his fourteen-day suspension and other punishments were caused by his protected statements. The defendants argue that other actions by Murray

led to his suspension, such as his refusal to timely submit a written memorandum concerning his allegations and to return a "rough draft" as ordered. Murray claims that these grounds are mere pretexts. In deciding this motion to dismiss or for summary judgment, the Court must construe disputed facts in favor of Murray. *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 157 (1970). Accordingly, for the purposes of this motion, the Court must assume that defendants' disciplinary actions were substantially motivated by Murray's protected speech.

The third and final question in the *Pickering* and *Mt. Healthy* analysis is whether the defendants can show that the disciplinary measures would have been taken even if Murray had never made the protected statements. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. at 285. Again, the Court finds a genuine dispute over this issue. Disputed questions of motivation cannot be decided by the Court at this stage. *See, e.g., Hanson v. Hoffman*, 628 F.2d 42 (D.C. Cir. 1980). Murray's First Amendment claim, therefore, passes the *Pickering* test.

Defendants also claim that even if they did violate Murray's First Amendment rights, they are immune from suit concerning that violation because of the qualified immunity granted government officials. *See Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982). Immunity is only granted, however, when the acts of the officials do not violate "clearly established" constitutional rights. 102 S. Ct. at 2738. The factual scenario alleged by Murray indicates that the defendants fabricated reasons other than Murray's statements to explain their actions because they realized those statements were clearly protected by the First Amendment. There is, thus, genuine dispute over whether defendants' actions violated clearly established constitutional rights. Defendants, therefore, are not entitled to dismissal of Murray's First Amendment claim based on qualified immunity.

The preceding analysis indicates that Murray may proceed on his First Amendment cause of action. The remaining four causes of action asserted in his Complaint, however, must be dismissed.

Murray raises a claim under the Fifth Amendment, arguing that he had liberty and property interests in his continued employment without being disciplined and that his interests were harmed without due process. The Court finds that even if Murray does have such property and liberty interests, he was given all the process that was due under the circumstances. Due process requirements vary according to the severity of the threatened loss. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319 (1976). In Murray's case, the major disciplinary action taken against him was a fourteen-day suspension without pay. Prior to that suspension he was notified of the proposed disciplinary action and given the opportunity to respond orally and in writing to accusations on which the action was based. Such notice and opportunity to be heard was sufficient to satisfy due process requirements under the circumstances. *See, e.g., id., Foster v. Ripley,* 645 F.2d at 1150.

The defendants are federal officials and their actions were within the outer perimeter of their official duties. *See Briggs v. Goodwin,* 569 F.2d 10, 16 (D.C. Cir. 1977). Under the doctrine of absolute immunity, therefore, "[u]nless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss." *Butz v. Economou,* 438 U.S. at 507-508. Murray's claims of defamation, intentional infliction of emotional distress, and civil conspiracy are common law tort claims, not based on the Constitution, and must be dismissed. *See Sami v. United States,* 617 F.2d 755, 770 (D.C. Cir. (1979).

An indicated, Murray may proceed only on his First Amendment claim. Accordingly, defendants' motion to dismiss is granted as to Counts 1, 3, 4 and 5 and denied as to Count 2.

An appropriate Order follows.

/s/ John Smith, Jr.

United States District Judge

Dated: March 21, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL C. MURRAY,	)
	)
Plaintiff,	)
	)
v.	) Civil Action No. 82-2405
	) FILED
THEODORE M. GARDNER, et al.,	)
	) MAR 21 1983
Defendants,	)
	) James F. Davey, Clerk
	)

ORDER

Upon consideration of defendants' motion to dismiss or, in the alternative, for summary judgment, plaintiff's opposition, the memoranda submitted by the parties, and the entire record, it is by the Court this 21st day of March, 1983

ORDERED that defendants' motion is granted in part and denied in part; and it is further.

ORDERED that the First, Third, Fourth and Fifth Causes of Action contained in plaintiff's complaint are dismissed.

/s/ John Smith, Jr.

United States District Judge